

Jason A. Lief (JAL-7742)  
MORGAN LEWIS & BOCKIUS, LLP  
101 Park Avenue  
New York, NY 10178  
(212) 309-6000

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
NOVOGEN RESEARCH PTY. LTD.

Plaintiff,

vs.

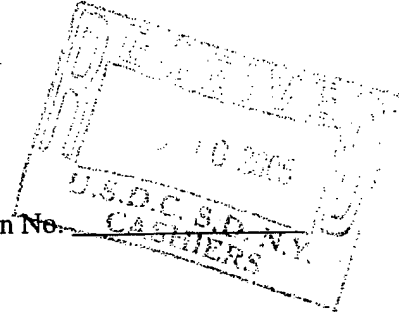
NBTY, INC.

Defendant.  
-----X

Civil Action No.

**COMPLAINT**

**JURY DEMAND**



Plaintiff Novogen Research Pty. Ltd. ("Novogen") for its Complaint against  
defendant NBTY, Inc. aver and allege as follows:

**JURISDICTION AND PARTIES**

1. This is a civil action for patent infringement arising under the patent laws of the United States, 35 U.S.C. §§271 et. seq.
2. Jurisdiction and venue are proper in this Judicial District pursuant to 28 U.S.C. §§ 1331, 1338(a), 1391, 1400(b) and N.Y. Civ. Prac. L & R 302(a).
3. Plaintiff Novogen is an Australian corporation having its principal place of business in New South Wales, Australia.
4. Defendant NBTY, Inc. is a Delaware corporation doing business and residing in (pursuant to 28 U.S.C. §1391(c)) and committing acts of patent infringement

in this Judicial District. Upon information and belief Defendant transacts business generally in this Judicial District.

**CAUSE OF ACTION FOR PATENT INFRINGEMENT  
OF UNITED STATES PATENT NO. 6,562,380**

5. On May 13, 2003, United States Letters Patent No. 6,562,380 ("the '380 patent") entitled "Methods for Treating or Reducing Pre-Disposition to Breast Cancer, Pre-Menstrual Syndrome or Symptoms Associated With Menopause By Administration of Phyto-Estrogen", was duly and legally issued to Graham Edmund Kelly. A true and correct copy of the '380 patent is attached to this Complaint as Exhibit A.

6. Plaintiff Novogen Research Pty. Ltd. is the owner and assignee of the '380 patent with full right to enforce the '380 patent.

7. Upon information and belief, defendant NBTY, Inc. has been on notice of the existence of the patent at least since on or around June 6, 2003 when correspondence was directed to a seller of defendant's products and was referred to the General Counsel of NBTY, Inc. who contacted plaintiff in July 2003. In addition, upon information and belief, defendant has had actual knowledge of the patent application that led to the '380 patent at least since correspondence dated on or about June 30, 2002 was directed to defendant's wholly-owned subsidiary Nature's Bounty and advised of the Patent Office Allowance of the patent claims.

8. Defendant NBTY, Inc. has committed acts of infringement of said '380 patent in this Judicial District and elsewhere by selling products containing certain phytoestrogens from clover or equivalent sources that are used for the patented method and by inducing and contributing to the use of the patented method without authority or

license from plaintiff. Upon information and belief, such acts of infringement by defendant have been willful.

9. Plaintiff has suffered and will continue to suffer damages and irreparable injury as a result of defendant NBTY, Inc.'s infringement unless enjoined by this Court.

#### **REQUEST FOR RELIEF**

**Wherefore**, plaintiff prays for judgment:

10. That defendant NBTY, Inc. has infringed United States Letters Patent No. 6,562,380.

11. Ordering that defendant, its officers, subsidiaries, agents, servants, employees, and attorneys and all persons in active concert or participation with any of them, be preliminary and permanently enjoined and restrained from any further infringement of United States Letters Patent No. 6,562,380.

12. Awarding plaintiff Novogen its damages caused by defendant NBTY, Inc., and that such damages be trebled.

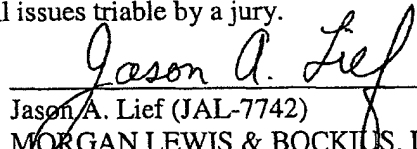
13. Awarding plaintiff interest, costs and disbursements in this action, including reasonable attorney's fees pursuant to 35 U.S.C. §285; and

14. Awarding plaintiff such further relief as the Court may deem just and proper.

#### **JURY DEMAND**

15. Plaintiff requests a jury for all issues triable by a jury.

Dated: January 25, 2005

  
\_\_\_\_\_  
Jason A. Lief (JAL-7742)  
MORGAN LEWIS & BOCKIUS, LLP  
101 Park Avenue  
New York, NY 10178  
(212) 309-6000

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
NOVOGEN RESEARCH PTY. LTD.

05 CV 1984

Case No.

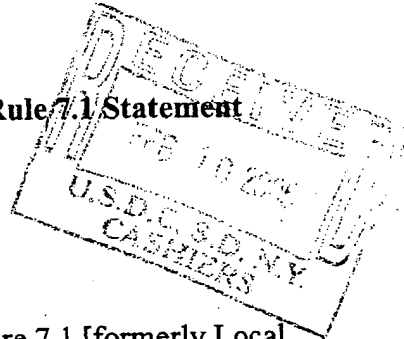
Plaintiff

-v-

NBTY, INC.

Defendant

Rule 7.1 Statement



Pursuant to Federal Rule of Civil Procedure 7.1 [formerly Local General Rule 1.9] and to enable District Judges and Magistrate Judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel for Novogen Research Pty. Ltd. (a private non-governmental party) certifies that the following are corporate parents, affiliates and/or subsidiaries of said party, which are publicly held.

Novogen Limited (ADR trades as NVGN)

Marshall Edwards, Inc. (variously trades as MSH or MSHL or MSHLW)

Date: February 10, 2005

Jason A. Tief  
Signature of Attorney

Attorney Bar Code:

M. Patricia Thayer (admitted *pro hac vice*)  
HELLER EHRMAN LLP  
333 Bush Street  
San Francisco, CA 94104-2878  
(212) 832-8300

Jonathan R. Dowell (admitted *pro hac vice*)  
Jeremy N. Kudon (JK8131)  
HELLER EHRMAN LLP  
7 Times Square  
New York, NY 10036-4041  
(212) 832-8300

Attorneys for Defendant  
NBTY, Inc.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

NOVOGEN RESEARCH PTY. LTD.

Plaintiff,

- against -

NBTY, INC.,

Defendant.

Civ. No. 05 CV 1984 (PKC)

**RULE 7.1 STATEMENT**

Pursuant to Federal Rule of Civil Procedure 7.1, and to enable District Judges and Magistrate Judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel for NBTY, Inc. certifies that NBTY, Inc. is a publicly-held corporation, that NBTY, Inc. has no parent corporation, and that no publicly-held corporation owns 10% or more of the stock of NBTY, Inc.

Dated: New York, New York  
May 16, 2005

HELLER EHRMAN LLP

By: /s/  
Jeremy Kudon  
Jonathan R. Dowell  
7 Times Square  
New York, New York 10036-4041  
(212) 832-8300  
Attorneys for Defendant  
NBTY, Inc.

1. NBTY admits that the Complaint purports to assert a claim of patent infringement under 35 U.S.C. Section 271 *et seq.*, but denies that any basis exists, in law or fact, for the claim.

2. NBTY admits that jurisdiction and venue are proper in this Judicial District.

3. NBTY is without sufficient knowledge or information to admit or deny the allegations of paragraph 3 and, on that basis, denies them.

4. NBTY admits that NBTY, Inc. is a Delaware corporation. NBTY admits that it transacts business in this Judicial District and resides in this Judicial District for the purpose of 28 U.S.C. § 1391(c). NBTY denies that it is committing acts of patent infringement in this or any other judicial district.

**Cause of Action for Patent Infringement  
of United States Patent No. 6,562,380**

5. NBTY admits that a copy of United States Patent No. 6,562,380 (“the ‘380 patent”) patent is attached to the Complaint and refers to that document for the date of issuance, title and named inventors. Otherwise, NBTY is without sufficient knowledge or information to admit or deny the remaining allegations of paragraph 5 and, on that basis, denies them.

6. NBTY is without sufficient knowledge or information to admit or deny the allegations of paragraph 6 and, on that basis, denies them.

7. NBTY admits that NBTY received notice of the existence of the ‘380 patent through correspondence dated June 6, 2003. NBTY admits that NBTY’s general counsel contacted plaintiff regarding this matter in July 2003. NBTY is without sufficient knowledge or information to admit or deny the remaining allegations in paragraph 7 and, on that basis, denies them.

8. NBTY denies the allegations of paragraph 8.

9. NBTY denies the allegations of paragraph 9.



### **Request for Relief**

10. NBTY denies that Plaintiff is entitled to any relief whatsoever for the acts alleged in the Complaint, either as prayed for in the Complaint or otherwise.

11. NBTY denies that Plaintiff is entitled to any relief whatsoever for the acts alleged in the Complaint, either as prayed for in the Complaint or otherwise.

12. NBTY denies that Plaintiff is entitled to any relief whatsoever for the acts alleged in the Complaint, either as prayed for in the Complaint or otherwise.

13. NBTY denies that Plaintiff is entitled to any relief whatsoever for the acts alleged in the Complaint, either as prayed for in the Complaint or otherwise.

14. NBTY denies that Plaintiff is entitled to any relief whatsoever for the acts alleged in the Complaint, either as prayed for in the Complaint or otherwise.

### **Jury Demand**

15. NBTY admits that Plaintiff purports to request a jury for all issues triable by a jury.

### **GENERAL DENIAL**

16. Further answering the Complaint, NBTY denies each and every allegation contained in the Complaint that was not specifically admitted above.

### **AFFIRMATIVE DEFENSES**

Further answering the Complaint and as defenses thereto, NBTY allege the following affirmative defenses.

### **First Affirmative Defense**

17. Plaintiff's Complaint fails to state any claim upon which relief may be granted.

### **Second Affirmative Defense**

18. NBTY has not infringed any valid claim of the '380 patent, either directly, indirectly, literally or under the doctrine of equivalents.

### **Third Affirmative Defense**

19. If one or more claims of the '380 patent is interpreted to cover any NBTY product currently offered for sale, then each such claim is invalid pursuant to 35 U.S.C. § 102, because each such claim was anticipated.

### **Fourth Affirmative Defense**

20. By reason of proceedings in the United States Patent and Trademark Office during prosecution of the applications that resulted in the issuance of the '380 patent, and the admissions and representations made therein, Plaintiff is estopped from asserting any construction of any claim of the '380 patent that would cover or include the alleged acts of infringement.

### **JURY DEMAND**

21. NBTY requests a jury for all issues triable by a jury.

### **PRAYER FOR RELIEF**

WHEREFORE, NBTY prays that this Court:

1. Dismiss all of the claims against NBTY with prejudice;
2. Declare this case exceptional under 35 U.S.C. § 285 and award NBTY its reasonable attorney fees;
3. Award NBTY its costs incurred in this action;

4. Award NBTY such other and further relief as this Court deems just and appropriate.

Dated: New York, New York  
May 16, 2005

HELLER EHRMAN LLP

By: /s/  
Jeremy Kudon  
Jonathan R. Dowell  
7 Times Square  
New York, New York 10036-4041  
(212) 832-8300  
Attorneys for Defendant  
NBTY, Inc.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
NOVOGEN RESEARCH PTY. LTD.

Plaintiff,

vs.

NBTY, INC.

Defendant.  
-----X

Civil Action No. 05 Civ. 1984 (PKC)

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 5/26/05

#### CASE MANAGEMENT PLAN

This Civil Case Management Plan, submitted in accordance with Rule 26(f), Fed.R.Civ.P., is adopted as the Scheduling Order of this Court in accordance with Rule 16(f), Fed.R.Civ.P.

1. All parties do not consent to conducting all further proceedings before a Magistrate Judge, including motions and trial. 28 U.S.C. § 636(c).
2. This case is to be tried to a jury.
3. Amended pleadings may not be filed and additional parties may not be joined except with leave of the Court. Any motion to amend or to join additional parties shall be filed within 30 days from the date of this Order.
4. Initial disclosure pursuant to Rules 26(a)(1), Fed. R. Civ. P., shall be completed not later than 21 days from the date of this Order.
5. All fact discovery shall be completed no later than December 5, 2005.
6. The parties are to conduct discovery in accordance with the Federal Rules of Civil Procedure and the Local Rules of the Southern District of New York. The following interim deadlines may be extended by the written consent of all parties without application to the Court, provided all fact discovery is completed by the date set forth in paragraph 5 above:

PKC

and may serve  
contention interrogatories  
on (a) infringement and  
(b) validity.

- a. Initial requests for production of documents to be served by June 30th, 2005.
  - b. Initial Interrogatories to be served by June 30th, 2005.
  - c. Fact Depositions to be completed by December 5, 2005.
  - d. Expert depositions to be completed 30 days after the exchange of rebuttal expert reports.
  - e. Requests to Admit to be served no later than October 21, 2005.
7. *Markman*/Claim Construction Procedure:
- a. On October 14, 2005, the parties will exchange lists of claim terms in dispute, proposed constructions of those terms, and the support for the proposed construction.
  - b. On December 19, 2005, the parties shall file and serve their briefs setting forth their proposed claim construction for any disputed claim terms and all support thereof.
  - c. On February 6, 2006, the parties shall file and serve their responsive briefs setting forth their proposed claim construction for any disputed claim terms and all support thereof.
  - d. It is anticipated that the Court shall hold a *Markman* Hearing in March 2006.
- 7A. Expert discovery shall be completed thirty (30) days after the exchange of rebuttal expert reports.
- a. The party with the burden of proof upon an issue shall serve and file its expert report(s) no later than 4 weeks after the *Markman* decision.
  - b. Expert reports intended solely to contradict or rebut evidence on the same subject matter identified by the other party in a previously submitted expert report shall be served and filed no later than 7 weeks after the *Markman* decision.
8. All motions and applications shall be governed by the Court's Individual Practices, including pre-motion conference requirements. Pursuant to the authority of Rule 16(b)(2), Fed. R. Civ. P., a motion for summary judgment will be deemed untimely unless a request for a pre-motion conference relating thereto is made in writing within fourteen (14) days of the close of the fact discovery (see paragraph 5 hereof).

9. Counsel must confer face to face for at least one hour to discuss settlement within fourteen (14) days following the close of fact discovery.
10. a. Counsel for the parties have discussed an informal exchange of information in aid of an early settlement of this case and have agreed upon the following:
- \_\_\_\_\_
- \_\_\_\_\_
- b. Counsel for the parties have discussed the use of the following alternate dispute resolution mechanisms for use in this case: (i) a settlement conference before a Magistrate Judge; (ii) participation in the District's Mediation Program; and/or (iii) retention of a privately retained mediator. Counsel for the parties propose the following alternate dispute resolution mechanism for this case:
- \_\_\_\_\_
- \_\_\_\_\_
- c. Counsel for the parties recommend that the alternate dispute resolution mechanism designated in paragraph b, be employed at the following point in the case (e.g. within the next sixty days; after the deposition of plaintiff (specify date); after the close of fact discovery):
- \_\_\_\_\_
- d. The use of any alternative dispute resolution mechanism does not stay or modify any date in this Order.
11. The Final Pretrial Submission Date is 30 days following the close of fact and expert discovery (whichever is later). By the Final Pretrial Submission Date, the parties shall submit a Joint Pretrial Order prepared in accordance with the undersigned's Individual Practices and Rule 26(a)(3), Fed. R. Civ. P. Any motions in limine (for which the premotion conference requirement is waived) shall be filed by the Final Pretrial Submission Date. If this action is to be tried before a jury, proposed voir dire, jury instructions and verdict form shall also be filed by the Final Pretrial Submission Date. Counsel are required to meet and confer on a joint submission of proposed jury instructions and verdict form, noting any points of disagreement in the submission. Jury instructions may not be submitted after the Final Pretrial Submission Date, unless they meet the standard of Rule 51(a)(2)(A), Fed. R. Civ. P. If this action is to be tried to the Court, proposed findings of fact and conclusions of law should be submitted by the Final Pretrial Submission Date.

PKC (Principals to meet for settlement discussion prior to September 16, 2005.)

12. Counsel for the parties have conferred and their present best estimate of the length of trial is 5 days.

**TO BE COMPLETED BY THE COURT:**

13. [Other directions to the parties]

14. The (next Case Management) (Final Pretrial Conference) is scheduled for September 30 at 2:15 PM.

All discovery of plaintiff should be coordinated with the discovery in the related case 05 Civ. 1983. All Markman briefs and hearing the hearing will be coordinated with 05 Civ 1983

This ORDER may not be modified or the dates herein extended, except by further Order of this Court for good cause shown. Any application to modify or extend shall be made in a written application in accordance with paragraph 1(E) of the Court's Individual Practices and shall be made no less than five (5) days prior to the expiration of the date sought to be extended.

  
P. Kevin Castel  
United States District Judge

Dated: New York, New York

May 26, 2005

1-NY/1912300.1

# MEMO ENDORSED

## HellerEhrman<sup>LLP</sup>

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 12/16/05

December 16, 2005

Via Facsimile (212) 805-7949

Hon. P. Kevin Castel  
United States District Judge  
United States District Court for the  
Southern District of New York  
500 Pearl Street, Room 2260  
New York, NY 10007

Re: Novogen Research Pty. Ltd. v. NBTY Inc., No. 05 Civ. 1984

Dear Judge Castel:

I am writing to request a one-week postponement of the upcoming pretrial conference and various filing deadlines in the above matter, pending the finalization of a settlement agreement between the parties. Pursuant to this Court's Case Management Plan dated May 26, 2005, a pretrial conference is currently scheduled for Monday, December 19, at 11:00 am. Furthermore, the parties must file claim construction briefs and request a pre-motion conference regarding any summary judgment motions by Monday as well.

At this time, a draft settlement agreement document has been prepared, and the parties will be working on conforming it to their understanding over the next several days.

I have spoken with Counsel for Plaintiff, Jason Lief, Esq., and we have agreed to jointly request a one-week postponement of the conference and all filing deadlines. Assuming, as we intend, that the parties complete and execute a settlement agreement document within that period, Mr. Lief will inform the Court of that fact and withdraw this action on behalf of his client. In the event that the parties are unable to execute a settlement agreement document within this one-week period, counsel will jointly so inform the Court.

Very truly yours,

*Patricia Thayer* / JDB

M. Patricia Thayer  
Counsel for Defendant

cc: Jason Lief, Esq. (via facsimile)

Heller Ehrman LLP 333 Bush Street San Francisco, CA 94104-2878 www.hellerhrman.com

Anchorage	Beijing	Hong Kong	Los Angeles	Madison, WI	New York	San Diego	San Francisco	Seattle
Silicon Valley	Singapore	Washington, D.C.						



CASE 5

ORIGINAL

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

NOVOGEN RESEARCH PTY. LTD.

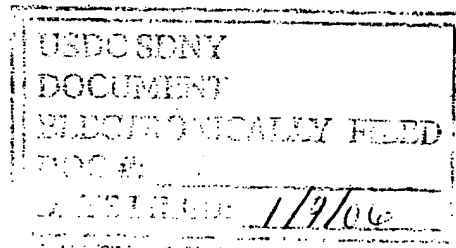
Plaintiff,

vs.

NBTY, INC.

Defendant.

Civil Action No. 05 Civ. 1984 (PKC)



**STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff Novogen Research Pty. Ltd. ("Novogen") and Defendant NBTY, Inc.

("NBTY"), by and through their undersigned counsel, hereby jointly stipulate pursuant to Rule

41(a)(1) of the Federal Rules of Civil Procedure to the dismissal of all claims with prejudice.

The parties agree that the Court retain jurisdiction over any disputes between the parties regarding the termination of the litigation. Each party shall bear its own attorneys' fees and costs.

McDERMOTT, WILL & EMERY, LLP

HELLER EHRMAN LLP

By: Jason A. Lief  
Jason A. Lief, Esq. (JAL-7742)  
50 Rockefeller Plaza  
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By: Patricia Thayer  
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(415) 772-6000

Dated: 1/5/2006

Dated: 1-5-2006

*McDERMOTT WILL & EMERY*  
*1-5-2006*